Supreme Court, U.S.
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91-727

UNITED STATES SUPREME COURT

October Term 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,

Petitioner,

v.

EDWARD C. NICHOLS,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Petitioner, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC ("ACTWU") addresses this reply to two points first raised by Respondent Edward C. Nichols ("Nichols") in Part II of his Brief in Opposition: that his job is excluded from coverage under the National Labor Relations Act ("Act") as a "managerial" position and that his

running for office was not protected concerted activity under the Act.

We demonstrate below that Nichols is wrong on both points. His retaliatory refusal to hire claim against ACTWU is at least arguably within the Act's jurisdiction — as Nichols himself previously claimed in his unfair labor practice charge to the National Labor Relations Board ("Board"). [Rec. 149, 154] Nichols' Brief in Opposition thus fails to show any reason why this case is not ideally suited for review of the significant issue presented squarely and cleanly by our petition.

1. The position which Nichols sought with ACTWU is arguably covered by the Act.

Nichols now claims that the Board would not have jurisdiction over his claim because his job was a "managerial"

one within the meaning of NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). That Nichols' position at the joint board level may be "managerial" does not answer the question of his status at the level of the parent organization, ACTWU, from whom he seeks relief in this case.

Although the South Carolina Supreme Court did not deal with the point Nichols is raising here, the Court of Appeals did address this argument — and did so properly:

> Nichols also argues the general principle that management employees are not subject to the jurisdiction of the NLRB. We agree with this general principle but find it unavailing in this case. If Nichols is an employee of the [joint board] rather than [ACTWU], then clearly he is a managerial employee not subject to the NLRB's jurisdiction. But if he is an employee of the [joint board] then [ACTWU] does not owe him any wages. If, as Nichols contends, he is an

> employee of [ACTWU], then it is at least arguable that he is not a managerial employee and, therefore, is subject to the NLRB's jurisdiction.
>
> Petition, p. A-20

Furthermore, as this Court explained in the analogous context of statutory supervisors, state courts are not free to assume jurisdiction unless the employee status of an individual "has been settled with unclouded legal significance." Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n, 382 U.S. 181, 190 (1965). In this case, had Nichols sought wages from the joint board where he was elected, his claim of "managerial" status would have some force. By choosing to seek wages from the parent union, however, Nichols made his claim dependent on his relationship with ACTWU itself, not its joint board. In these

circumstances South Carolina is certainly not free to assume jurisdiction over a relationship which Nichols himself previously claimed by his Board charge was covered by the Act.[1]

Indeed, it bears emphasis that Nichols' claim of exclusion from the Act's coverage is a complete about-face from his earlier position. Before filing this lawsuit Nichols filed his unfair labor practice charge with the Board in NLRB Case No. 11-CA-12320 claiming that

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[1]Nichols' reliance on an arbitration award, which involved neither himself nor the joint board in question, does not support his argument about jurisdiction under the Act. That award simply holds that individuals who exercise independent judgment "at the Joint Board level" [Rec. 190] are "managers" and thus excluded from a bargaining unit of the union's employees. [Rec. 184] The award does not address, much less decide, the issue of whether the ACTWU staff representative job to which Nichols was seeking reinstatement is subject to the Board's jurisdiction. Ibid.

ACTWU had discriminated against him as an "employee" under the Act. [Rec. 149] We are confident that in view of this chronology the Court will appropriately discount Nichols' newly found enthusiasm for the "managerial" exclusion from the Act.

In any event, Nichols' attempt to avoid review by claiming that he is outside the Act's coverage is unavailing. The petition presents no jurisdictional difficulty which would make the case an inappropriate vehicle for examining the serious preemption issue raised by the South Carolina Supreme Court's decision.

2. Nichols' conduct is arguably covered by the Act.

Nichols' running for office is protected concerted activity under § 7 of the Act. 29 U.S.C. § 157. The depositions of Nichols and his allies

reveal a concerted effort by a dissident group of individuals within the joint board who wanted to oust Robert Ross, the incumbent manager. [Rec. 30-31 (Nichols); 81-82 (Fletcher Beck); 84-85 (J.B. Comer); 103 (William Cranford); 107 (Walter D. Stroud)] After considering other candidates, the group decided that Nichols would run against Ross, who was backed by ACTWU management, in the next election. Ibid. By undertaking this task with the support and for the benefit of his compatriots, Nichols' conduct fell squarely within the "other concerted activities" portion of § 7 of the Act.

The Board's regional office which handled Nichols' charge explained precisely how his running for office brought him within the Act's jurisdiction:

> Specifically, [Nichols] is alleging that as a result of his having won the election for the position of [joint board manager], [ACTWU] has retaliated against him by refusing to make the payment of his wages and benefits. The animus. . . is. . . his having defeated [ACTWU's] choice for the position of manager. . .
>
> [Rec. 154]

The failure of a labor union, acting as an employer, to hire or recall a staff representative in retaliation for that individual's protected concerted activities having to do with internal union affairs, is a recognized violation of § 8(a)(3) of the Act. E.g., Machinists Dist. Lodge 91, 298 NLRB No. 47, enforced 934 F.2d 1288 (2d Cir. 1991) cert. filed, No. 91-723 (November 4, 1991). Cf. Okla-Inn Inc., 198 NLRB No. 68 (1972), enforced 488 F.2d 498 (10th Cir. 1973) (Protest regarding employer's

selection of supervisory personnel is protected concerted activity).

In Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), this Court pointed out that it is for the Board to "delineate precisely the boundaries of the 'mutual aid or protection' clause" and that in doing so the Act must be construed generously so that employees would not be left "open to retaliation for much legitimate activity that could improve their lot as employees." 437 U.S. at 567-68.

In this case it is not difficult to understand how Nichols' running for office related to the well-being of employees represented by the joint board and to the joint board's collective bargaining activities themselves. The manager of a joint board negotiates and

services contracts between ACTWU and the employers by whom the joint board members are employed. It is the manager who handles grievances, arbitrations and other employee problems arising out of the performance of these contracts. Opposition to an incumbent manager by a dissident group would thus have an immediate bearing on the economic well-being of the employees in the local unions making up the joint board. That is how Nichols' running for office was inextricably bound up with the collective bargaining process as well as with other activities affecting the well-being of his fellow union members.

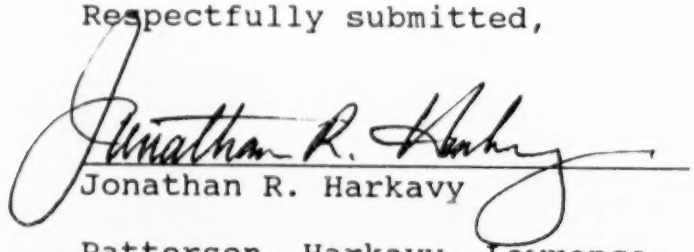
Opposition to certiorari on the ground that Nichols' activities are not within the Act's coverage is thus groundless both factually and legally.

Nichols' attempt to conjure jurisdictional difficulties, however artful, is ultimately illusory and cannot obscure the importance, substantiality and clean presentation of the question presented for review.

CONCLUSION

For the reasons stated in ACTWU's petition and in this reply, a writ of certiorari should issue to review the decision of the South Carolina Supreme Court.

Respectfully submitted,



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January 6, 1992